Office-Supreme Court, U.S.
FILED
OCT 5 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1964

No. 543

Nicholas deB. Katzenbach, as Acting Attorney General of the United States of America; Macon L. Weaver, as United States Attorney for the Northern District of Alabama,

Appellants,

v.

Ollie McClung, Sr., and Ollie McClung, Jr.

AMICUS CURIAE BRIEF OF THE STATE OF NORTH CAROLINA

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INDEX

Opinion Below 1

Interest of the State of North Carolina 1

Statement of the Case 2

Question Presented 2

Summary of Argument 2

Civil Rights Act of 1964 3

Constitutional Provisions 4

Argument 5

Constitutional Provisions and Statutes 4

Article I, Section 8, of the Constitution of the United States 4

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OPINION BELOW

The Opinion of the Three-Judge Federal Court in this case was issued in Civil Action No. 64-448 and is dated September 17, 1964, instituted in the United States District Court for the Northern District of Alabama, Southern Division. The Opinion is not yet officially reported.

INTEREST OF THE STATE OF NORTH CAROLINA

The State of North Carolina is interested in knowing to what limits the Commerce Clause (Article I, Section 8, Constitution of the United States) may be extended and whether

or not this Clause can be used to regulate social relationships and every activity of the lives of its citizens.

STATEMENT OF THE CASE

Plaintiffs operate as a partnership and have a restaurant in Birmingham. It has been operated by the plaintiffs' family at this location since 1927. The chief business of plaintiffs is serving barbecued meats, homemade pies and nonalcoholic beverages. The business is eleven blocks from the nearest interstate highway and a greater distance from the nearest railroad station and bus station, and, likewise, the business is between six and eight miles from the nearest airport. Plaintiffs purchase their food locally from a meat-packing company and from this company's Birmingham branch. The meat purchased from the Birmingham branch is shipped in from outside the State of Alabama. Plaintiffs have not complied with the Civil Rights Act of 1964, and would lose a substantial amount of business if forced to serve Negroes. From its beginning plaintiffs have only served white customers. The Court below concluded as a matter of law that a substantial portion of the food served by plaintiffs has moved in commerce within the meaning of the Act.

QUESTION PRESENTED

Are the provisions of Title II of Public Law 88-352, 78 Stat. 241, relating to discrimination in places of public accommodation, valid and constitutional under the provisions of the Commerce Clause of the Constitution of the United States (Article I, Section 8)?

SUMMARY OF ARGUMENT

Apparently this case was tried upon the theory that there was no application of the Fourteenth Amendment since the Three-Judge Court states in its opinion that it was conceded at oral argument "that the State of Alabama, in none of its manifestations, has been involved in the private conduct of

plaintiffs in refusing to serve food to Negroes for consumption on the premises."

The State of North Carolina will argue that in the regulation of commerce among the states there was never intended to join to or relate to such regulation any and all collateral incidents and activities that may take place among the residents of a state or any other persons who may happen to be within its borders. The State of North Carolina will further argue that somewhere the stream or flow of interstate commerce must cease; that the commodities or products brought into a state must somewhere and at some time become a part of the products and property of the state and that interstate commerce does not go on forever and attach itself to all functions and activities that take place within a state and thereby subject to congressional regulation and control of Congress every aspect of social and commercial life within a state. The State of North Carolina will argue that however desirable the social objectives to be achieved regulation under the Commerce Clause cannot be the constitutional basis of every form of equality that minority groups may think desirable nor was the Commerce Clause designed to destroy the individualism of the citizens of a state nor to prohibit the social groupings and classes which are naturally created and molded by personal inclination. The State of North Carolina will further argue that in the case before the Court all functions of interstate commerce have ceased when the products are delivered to the wholesale distributor and certainly when the products are delivered to the establishment that completely changes the form and qualities of the food for service to customers.

CIVIL RIGHTS ACT OF 1964

The pertinent portions of the Civil Rights Act of 1964, as applicable to this case, are quoted by the Three-Judge Federal Court as follows:

> "Section 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, fa-

cilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: . . .

. . . .

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

. . . .

"(c) The operations of an establishment affect commerce within the meaning of this title if . . . . (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce . . . . ."

CONSTITUTIONAL PROVISIONS

Article I, Section 8, of the Constitution of the United States, with reference to Commerce, provides as follows:

"The Congress shall have power * * *

"to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *

"And to make all laws which shall be necessary and

proper for carrying into Execution the foregoing Powers * * *."

ARGUMENT

The Court is now asked to expand the concept of the regulation of commerce among the states far beyond any point or limit as explained and developed in all previous decisions of this Court. This the Court is asked to do not because of any pressing need which has been pointed up for the regulation of commerce and its free flow or because of any acts that burden interstate commerce or because of any internal conditions in the State that develop into obstructions to interstate commerce but rather because a predesigned social objective is sought and those seeking to establish this leveling process look everywhere in the Constitution to find some basis for their preconstructed theory.

As pointed out in the Opinion of the Court there has always been some substantial relationship to the movements of commerce between the states or some intrastate activities which potentially and naturally develop into obstructions which burden or hinder the freedom of the flow of commerce among the states. The bases of these decisions have always been tied to articles or material things which move in commerce or the preparation of which articles and things are designed to move in commerce. Sometimes the economic competitive conditions in the several states have been deciding factors. The Court Below points out examples such as the Robinson-Patman Act, the Federal Food, Drug and Cosmetic Act, the White Slave Laws, Gambling Devices Transportation Act, the Agricultural Adjustment Act of 1938, the Fair Labor Standards Act, and the National Labor Relations Act. It will be seen that however indirect all of the subjects covered by these Acts relate to transportation and commerce, and it is not denied that the means utilized by Congress to carry out its regulations may have the characteristics of police regulations.

The above portions of the Civil Rights Act of 1964, dis-

regard all previous concepts as to when commerce ends and comes to rest at its destination in a state. We have previously thought that when articles carried in commerce arrive at their destination in a state where they are held for final disposal or use the articles became a part of the mass of property in the state and commerce ended, and this was especially true when the articles passed to the buyer to be used by him in intrastate trade. Certainly this has previously been true when the articles or goods reached the point where the parties originally intended that the movement in commerce should finally end. The preparation and serving of food could not possibly burden or obstruct interstate commerce and whatever words are used, either "direct", "indirect", "substantial" or "material", could possibly bring into focus a situation that affects commerce in the sense of these words by the service of prepared food as shown in this case. However, the statute now under scrutiny by its own words and in conclusive manner produces a situation where the fact that food has moved in commerce at all affects commerce. If this is true, then the current and flow of commerce among the states never ceases and Congress will, therefore, have the power to regulate and control every facet and detail of the lives and activities of the citizens who live in a state. We wear clothing that has moved in interstate commerce, we live in houses of which the materials of construction moved in interstate commerce, the lawyer's books and office equipment moved in interstate commerce, and the books and office equipment and facilities of the dentist and physician moved in interstate commerce. If the logic contained in this statute is true, then there is no reason why Congress should not or could not regulate the laws of homicide because the weapons or instruments of death had previously moved in commerce among the states. Of course, these situations are not named in the statute under consideration but the limits of the logic of the statute would contemplate all these things. The Court may be sure that if this situation is held to be subject to the regulation of Congress under the Commerce Clause, then the pressure to push the controls into other fields will be unending.

We will not discuss the many cases on the subject or

attempt to distinguish the words and phrases used in various decisions since this will be done in the briefs of the parties. It is our view that the decision made in this case places the Court at a constitutional cross-roads for it must decide whether or not a dual system of government, operated by a central government and by a local government of states, shall continue to exist. Unless some limitation is placed on the powers that can be exerted by Congress under the Commerce Clause, then the most powerful constitutional forces to abolish all state functions and powers will have been created. The potential powers that lurk in the Commerce Clause and its judicial expansion are far greater than those given to the Federal Government by the Fourteenth Amendment and other provisions of the so-called Bill of Rights.

There exists in this Nation today a Marxist group known as The Socialist Labor Party of America. The ideology is the same as that of the Communist Party except for the fact that the Socialist Labor Party of America does not believe in trying to overthrow the present government of this Nation by force and violence. This Marxist group believes that there lurks in the Constitution of this Nation sufficient powers to abolish all individualism and private property without resorting to revolution by force of arms. The Party was organized in 1890, and one of its great theoreticians was a man by the name of Daniel DeLeon. On August 23, 1913, DeLeon made some prophecies about the Commerce Clause of the Constitution and the Weekly People, the official organ of the Party, in its issue of Saturday, August 17, 1963, wrote an editorial on DeLeon's prophecy, which was entitled "Implications of the Commerce Clause." After reviewing the powers that had been exerted under the Commerce Clause the editorial said:

> "The important thing is that the Administration proceeded to use its most powerful constitutional instrument.
>
> "The Commerce Clause (Article I, Section 8) reads: 'The Congress shall have power * * * to regulate com-

merce * * * among the several states.' Implicit in these words is a principle that foreshadows the Socialist Industrial Republic, for it asserts the power of the Nation over the economy. Justice Oliver Wendell Holmes has pointed out that the Commerce Clause is a recognized vehicle of national policy of all sorts. But it was Daniel DeLeon, foremost Marxist and eminent authority on constitutional law, who perceived in this Clause a projection of the Socialist Republic. Thus, in an editorial captioned 'The Amendments Flood', Daily People, August 23, 1913, DeLeon wrote:

"'The constitutional provision that empowers Congress to regulate commerce is the leading germ of the Socialist Republic embodied in the Constitution. The Clause was an unconscious projection far ahead of the time of its enactment. It projected the day when the political State shall have ceased to be, and the chick which the political State hatched, the Industrial State (by which DeLeon, of course, meant the nonpolitical socialist commonwealth), will have supplanted it.'

"When the social revolution shall have been accomplished the Commerce Clause, now in the Constitution, will stand out as the grain of gold freed from the mass of the other clauses which are but the bourgeois alloy that the grain of gold is now amalgamated with. Until then there will be amendments galore. While seemingly, and supposed to be, revolutionary, these are basically reactionary, in that one and all tend to becloud the really revolutionary germ of the Constitution.

"There will be One amendment that will be an Amendment—it will be an amendment in the nature of a substituted motion—it will be the amendment enforced by the industrially organized useful occupations of the land—an amendment that will annul all the clauses of the Constitution but one, the Commerce Clause, and

will be the highest exposition, verifier and enforcer of the Clause."

Thus we have seen the prophecy and socialist vision made by the Marxist DeLeon in 1913 come to fruition and maturity by the Civil Rights Act of 1964.

Respectfully submitted,

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